FILED
OCT 26 1942
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 457

EDDIE J. VIATOR, ET AL.,
Appellants,

vs.

R. C. EDWINS, SHERIFF, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

ALBERT SIDNEY JOHNSON, JR.,
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SUPREME COURT OF THE UNITED STATES

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF ON BEHALF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Counsel for appellees has filed a statement against the jurisdiction of this Court and motion to dismiss or affirm, pursuant to Rule 12, paragraph 3 of this Court, but he has failed to comply with and conform to Rule 7, paragraph 1 of the Revised Rules of the Supreme Court of the United States. His motion to dismiss or affirm does not clearly state its object and the facts on which it is based. While Rule 12, paragraph 3 permits appellees to file a type-

written statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant, and include in, or file with, such opposing statement, a motion to dismiss or affirm, it is respectfully submitted that Rule 7, paragraph 1 requires every motion to the court to state clearly its object and the facts on which it is based, and for that reason it is contended that said motion of appellees to dismiss or affirm should be overruled.

Taking advantage of the opportunity afforded by appellees to file a brief in this Court (Rule 7, paragraph 3), counsel for appellants submits the following brief and argument on behalf of appellants sustaining the jurisdiction of this court of this case on appeal from the Supreme Court of Mississippi.

The counter jurisdictional statement of appellees does not meet the requirements of Rule 12, Section 3 of the Supreme Court of the United States. The statement of facts made by appellants in their jurisdictional statement is not denied. Appellees do not show they afforded taxpayer due process of law. They do not quote any part of the record to sustain them. They admit the jurisdictional requirements contended by appellants. They do not show such requirements of the statutes were complied with. They cannot superimpose in this appeal case more than the record shows. Their demurrer is their only pleading. Said demurrer merely challenged the Bill on its face, said there was no equity on the face of the Bill. Appellants say they were denied due process, that the State statutes as construed and applied against them, violate the 14th Amendment to the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi. That, we submit, is more than enough equity to sustain the Bill of Complaint and require an answer. It is sufficient to

require this Court to take jurisdiction of this appeal case under Sec. 237 (a), Judicial Code.

> "Sec. 237(a). A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The question for decision is whether Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, General Session Laws of Mississippi, under the purported authority of which additional sales tax assessments were made for the years 1937 and 1938 against Eddie J. Viator, taxpayer, as construed and applied by the State Tax Commission of Mississippi, A. H. Stone, Chairman; J. E. Davis, Excise Commissioner, and the Supreme Court of Mississippi, violate the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi, and deny taxpayer due process of law and the equal protection of the law.

The case comes here by appeal from a decree of the Supreme Court of Mississippi, which sustained the tax and affirmed decree of the Chancery Court of Harrison County, Mississippi, sustaining demurrer to Bill of Complaint filed

to enjoin the execution of judgment of the Circuit Court of Hinds County, Mississippi, affirming said assessments.

Appellants contend that the case is properly an appeal, under Section 237(a) of the Judicial Code as amended, 28 U. S. C., Section 344(a), 28 U. S. C. A., Section 344(a), because the validity of the Mississippi statutes as applied to the facts of this case, has been drawn in question.

Dahnke Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239.

The following quoted allegations from appellant's Bill of Complaint, filed in the Chancery Court, show that appellants launched their attack upon the validity of the statutes themselves, as construed and applied, viz:

(a) "2. That the Sales Tax Statutes of Mississippi, as construed and applied against Complainant by the State Tax Commission of Mississippi, and A. H. Stone, Chairman thereof, and attempted to be enforced against Complainant, and as construed and applied against Complainant by the Circuit Court of Hinds County, and the Supreme Court of Mississippi, as hereinafter more fully shown, are unconstitutional, null and void, and violate the Fourteenth Amendment to the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi, and deprive Complainant of, and deny to him, the equal protection of the law and due process of law" (R. 5).

(b) "4. This is a controversy arising over the constitution and laws of the United States, in that Complainant asserts, alleges and claims that said House Bills Nos. 70, 559, and 668, passed by the legislature of the State of Mississippi, and approved February 28th, 1934, March 26th, 1936, and April 4, 1938, respectively, in the various particulars hereinafter more particularly set out, as construed and applied by A. H. Stone, Chairman of the State Tax Commission of Mississippi, the State Tax Commission of Mississippi,

against Complainant, and as construed and applied by the Circuit Court of Hinds County, Mississippi, and the Supreme Court of the State of Mississippi, against Complainant, violate Section Fourteen of the Constitution of Mississippi and the Fourteenth Amendment to the Constitution of the United States, in that said statutes, as construed and applied, and attempted to be enforced against Complainant, deprive him of his property without due process of law, are an arbitrary exercise of power, and deny to Complainant the equal protection of the law" (R. 6-7).

(c) "24 (13) That Chapter 113, Laws of 1938, and Chapter 150, Laws of 1938, as construed and interpreted by respondents, and attempted to be enforced by them against Petitioner, deny to Petitioner the equal protection of the law, guaranteed by the 14th Amendment to the Constitution of the United States, and deny to petitioner due process of law guaranteed by said 14th Amendment to the Constitution of the United States, and said laws, Chapter 113, and Chapter 150, of the Laws of 1938, are unconstitutional, null and void, and violate the 14th Amendment to the Constitution of the United States" (R. 52-53).

(d) "26. * * * Complainant shows the Court that the statutes of the State of Mississippi, copied in extenso herein, as construed and applied against Complainant, deprive him of due process of law and the equal protection of the law, and they are unconstitutional, null and void, and violate the Fourteenth Amendment to the Constitution of the United States and Section 14 of the Constitution of the State of Mississippi. * * *" (R. 57-58).

Appellants show this Court that they attacked the statutes of the State, as construed and applied against them, as violative of the Fourteenth Amendment to the Constitution of the United States and Sec. 14 of the Constitution of Mississippi, in Paragraphs 27, and 31, of their Bill of Complaint filed in the State court (R. 61-62 and R. 63, 64, 65).

The conditions prescribed by the Judicial Code, for an appeal from a State court decision to the Supreme Court of the United States were, and are, rigorously fulfilled. The objection raised in *Memphis Natural Gas Co.* v. *Beeler*, 62 S. Ct. 859, are thus met and overcome.

The validity of the State statutes, i. e., Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, were challenged by appellants' Bill of Complaint, R. 4-69, Assignment of Errors, R. 117, 119, 123, 5, 6, Suggestion of Error, omitted from certified transcript, and application for Certificate, omitted from certified transcript, all filed in the State courts, and is further challenged by the Assignment of Error filed in this Court (R. 131, 2, 3, 4, 5, 6, 7, 8, 9, 140, 141).

Appellants met the burden imposed on them to show affirmatively that this Court has jurisdiction under Section 237(a) of the Judicial Code, as amended.

The obligatory appellate jurisdiction of this Court is invoked, under Judicial Code, Section 237(a), as amended.

The facts of this case are admitted by demurrer (R. 100-102), they show that appellees, Commission, its Chairman, and the Excise Commissioner, acted without jurisdiction (R. 40, 42, 3, 4, 5, 6). No hearing sufficient to meet the demands of due process was granted. Appellees proceeded without evidence (R. 42, 3, 4). They refused to investigate the matter fully, as required by Section 6, Chapter 113, Laws of 1938; said they would not investigate it fully, or at all. No report in writing was made, setting forth a review of the cause and the essential facts of the matter. Appellees failed and refused to confront taxpayer with witnesses against him; they gave him no opportunity to know the state of case against him and to cross-examine witnesses. They refused him subpoenas for witnesses in his behalf. They failed to show taxpayer was delinquent in maintaining adequate records and preserving invoices for a period of two

years (R. 42, 3, 4, 5, 6). Without such showing, the Commissioner mentioned in Section 6, Chapter 113, Laws of 1938, had no jurisdiction to make additional sales tax assessments against appellant. Appellees failed and refused to give taxpayer notice of the additional returns and assessments by registered mail as required by said Section (6). They merely wrote him a letter and said he owed additional sales tax (R. 79). Copies of the returns and assessments were not attached and enclosed. No assessments were ever introduced in evidence. They are not in the record. Appellees did not make out a *prima facie* case. After the refusal of the Excise Commissioner to make a report in writing, setting forth a review of the cause and the essential facts of the matter, the appeal to the entire Commission, pursuant to Section 1, Chapter 150, Laws of 1938, was a mere formality. Not having heard the matter and without any evidence in the record, and with no report in writing by the Excise Commissioner, required by said Section (1), the appeal to the entire Commission was a farce. The Commission only had a letter from the Excise Commissioner concluding that said assessments should remain as originally assessed (R. 44-45). Objections made by taxpayer to the Excise Commissioner and the Commission were ignored and went for naught.

The Bill of Complaint alleges and the demurrer admits, that appellees, Commission, its Chairman and the Excise Commissioner, acted arbitrarily, capriciously, and without foundation in fact, there was no evidence to sustain the additional assessments (R. 42, 3, 4); they were not made from the best information available, after showing jurisdictional facts, i. e., that taxpayer failed to maintain adequate records and preserve invoices for a period of two years (R. 42). The Bill of Complaint alleges and the demurrer admits that appellees, Commission, its Chairman and the Excise Commissioner, failed to do their statutory duty,

they acted *ultra vires*, they failed and refused to investigate the matter fully before proceeding further under Section 6, Chapter 113, Laws of 1938, when taxpayer petitioned the Commissioner in writing, stating that said assessments were incorrect; that he did not owe said taxes, or any taxes to the State of Mississippi, and denied jurisdiction to make said additional assessments (R. 42). Appellees failed and refused to comply with the proviso contained in Section 6, Chapter 113, Laws of 1938, which is in the following language:

> "Provided, however, in the event such taxpayer, within ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the Commissioner shall grant a hearing on such petition, and investigate that question fully before proceeding further under this section."

When appellant, taxpayer, filed his petition in writing, pursuant to said Section (6) and the proviso quoted, he met the *prima facie* case against him. It became the bounden duty of the Commissioner to investigate the matter fully before proceeding further.

The decision in the former appeal case, *Viator* v. *State Tax Commission*, 193 Miss. 266, 5 So. (2d) 487, 62 S. Ct. 1109, 62 S. Ct. 1275, is not the law of this case on this appeal, as contended by appellees in their separate statement making against the jurisdiction of this Court, for the reasons that the merits of the case were not passed on. The State court in effect held that taxpayer resorted to an improper remedy; that whether there was evidence before the State Tax Commission on which to base the assessments was not before the Circuit Court of Hinds County and not before the Supreme Court of Mississippi, because on certiorari, the court could consider only errors of law arising or appearing on the face of the record.

The formal judgment entered in the first appeal case (*Viator* v. *State Tax Commission, et al.*, 193 Miss. 266, 5 So. (2d) 487, 316 U. S. 644, 62 S. Ct. 1109, 86 L. Ed. 1728, 316 U. S. 711, 62 S. Ct. 1275) decreed that the appellees have and recover of appellant, taxpayer, the amount of the two additional sales tax assessments, but it is to be interpreted in the light of the court's opinion, findings and conclusions of law. So interpreted it rests wholly on the court's declaration that appellant, taxpayer, misconceived his remedy; that certiorari was an improper remedy, and the court would only consider questions of errors of law arising or appearing on the face of the record. *Metropolitan Water Co.* v. *Kaw Valley Drainage Dist.*, 223 U. S. 519, 523, 32 S. Ct. 246, 247, 56 L. Ed. 533; *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135, 46 S. Ct. 52, 53, 70 L. Ed. 195; *Clark* v. *Williard*, 292 U. S. 112, 118, 54 S. Ct. 615, 617, 78 L. Ed. 1160; *American Propeller & Mfg. Co.* v. *United States*, 300 U. S. 475, 479, 480, 57 S. Ct. 521, 528, 81 L. Ed. 751.

The formal decree entered by the State court in the present appeal case, affirms the decree of the Chancery Court, sustaining demurrer and dismissing the Bill of Complaint, but in the light of the court's opinion, findings and conclusions of law, it rests wholly on the court's declaration that the statutes of the State are correctly construed and applied, and are thus constitutional, and do not deprive taxpayer of due process of law. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 63 S. Ct. 1071, No. 15.

Appellants took the position, then and they take it now, that the complaint of lack of evidence to sustain an administrative order is a question of law.

Union Tank Line Co. v. *Wright*, 249 U. S. 275 (holding that taxes must follow realities, not mere deductions from inadequate or irrelevant data); *The Chicago Junction* case, 264 U. S. 258; *Peoria & P. U. R. Co.* v. *United States*, 263

U. S. 528; *I. C. C.* v. *Louisville & N. R. R. Co.*, 227 U. S. 88, and *Lehigh Valley R. Company* v. *United States*, 243 U. S. 412 (holding that orders of administrative tribunals, quasi-legislative and quasi-judicial, must be supported by evidence). In *Florida E. C. R. Co.* v. *United States*, 234 U. S. 167, and *I. C. C.* v. *Louisville & N. R. Co.*, 227 U. S. 88, this Court held that refusal to consider the evidence which was introduced or properly offered for introduction, or to make a material finding without evidence is arbitrary action and an order so made must be reviewed by the courts.

Appellants say that the decision of the State Court in the first case was erroneous, as was pointed out in Suggestion of Error filed in the Supreme Court of Mississippi, and contend now that the decision in this appeal case by the State court is erroneous and that the decision of the first case is not the law of this case and *res judicata*.

In *Durousseau* v. *U. S.*, 6 Cranch 307, 3 L. Ed. 232, the court held that a decision is not an authority upon a question not considered by the court, although involved in a case decided.

Cromwell v. *Count of Sac.*, 94 U. S. 351, 352, 353;
Southern Pacific R. Co. v. *United States*, 168 U. S. 1, 48;
United States v. *Moser*, 266 U. S. 236, 241.

Here in this present appeal case, the facts are before the court by Bill of Complaint for injunction. The Bill of Complaint alleges and the demurrer admits that appellant taxpayer was proceeded against without evidence, without opportunity to know the state of case against him, without witnesses in his behalf, without being confronted with the witnesses against him and given an opportunity to cross-examine said witnesses, without jurisdiction, without compliance with the statutes, and without a report in writing setting forth a review of the cause and the essential facts

of the matter; that the appellees, Commission, its Chairman and the Excise Commissioner, proceeded against appellant taxpayer contrary to the accepted course of judicial proceeding and taxpayer has never had his day in court, and that no court in the State of Mississippi may judicially determine taxpayer's liability for additional sales tax. The decision of the State court in the first appeal case is erroneous because the assessments were not based on evidence, and the court erroneously held that taxpayer was given an opportunity to overcome by evidence the facts on which the assessments were based. The decision is therefore put upon a basis of fact shown to be without support in the record.

This court is free to investigate all of the facts of this case, and will examine them independently of the State court decision.

> *American F. Ins. Co.* v. *King Lumber, etc., Co.*, 250 U. S. 2, 39 S. Ct. 431, 63 L. Ed. 810, affirming on other grounds 77 So. 168, 74 Fla. 130.

In *Adams* v. *Russell*, 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed. 1224, the court said:

> "The rule is a salutary one in view of the different jurisdictions of the state courts and of this court. It leaves in both the full plentitude of their powers. It permits no evasion of the state court of the responsibility of determining the federal question if necessary to be determined; * * * The sufficiency of the local question to sustain the judgment rendered, and the necessity for the determination of the federal question necessarily we have to consider."

In *American Sugar Refining Co.* v. *State of Louisiana*, 21 S. Ct. 43, 179 U. S. 89, 45 L. Ed. 102, the court held that a motion to dismiss a writ of error on the ground that no Federal question is involved must be denied where the pro-

tection of the Fourteenth Amendment is invoked in the answer, and the defense is at least plausible on its face.

Neilson v. *Lagow*, 12 How. 98, 13 L. Ed. 909;

Maguire v. *Tyler*, 8 Wall. 650, 19 L. Ed. 320;

Klinger v. *Missouri*, 13 Wall. 257, 20 L. Ed. 635;

St. Louis, etc., R. Co. v. *McWhirter*, 229 U. S. 265, 33 S. Ct. 858, 57 L. Ed. 1179;

Baltimore, etc., R. Co. v. *Maryland*, 20 Wall. 643, 22 L. Ed. 446;

Ward v. *Love County*, 253 U. S. 17, 40 S. Ct. 419, 64 L. Ed. 751, reversing 68 Okl. 287, 173 Pac. 1050, followed in *Broadwell* v. *Carter County*, 253 U. S. 25, 40 S. Ct. 422, 64 L. Ed. 759, reversing 71 Okl. 162, 175 P. 828.

In *Fox River Paper Co., et al.* v. *Railroad Commission of Wisconsin*, 47 S. Ct. 669, 71 L. Ed., —, this Court held whether State court, in basing decision on non-Federal grounds, has thereby sought to evade constitutional issue, is a question on which litigant is entitled to invoke the judgment of the Supreme Court of the United States, though existence of the right for which constitutional protection is claimed depends on State law.

Interstate Amusement Co. v. *Albert*, 239, U. S. 560, 36 S. Ct. 168, 60 L. Ed. 439;

Watters v. *Michigan*, 248 U. S. 65, 39 S. Ct. 29, 63 L. Ed. 129, affirming on other grounds 192 Mich. 462, 158 N. W. 865

In *Southern P. Co.* v. *Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 33 S. Ct. 277, this Court said:

> "The question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error."

To the same effect as *Southern P. Co.* v. *Schuyler, supra,* are *North Carolina R. Co.* v. *Zachary,* 232 U. S. 248, 259, 58 L. Ed. 591, 595, 34 S. Ct. 305; *Carlson* v. *Washington,* 234 U. S. 103, 106, 58 L. Ed. 1237, 1238, 34 S. Ct. 717; *Norfolk & W. R. Co.* v. *West Virginia,* 236 U. S. 605, 610, 59 L. Ed. 745, 35 S. Ct. 437; *Interstate Amusement Co.* v. *Albert,* 239 U. S. 560, 567, 60 L. Ed. 439, 443, 36 S. Ct. 108.

See also *Norfolk, etc., R. Co.* v. *Conley,* 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745, and *Carlson* v. *Washington,* 234 U. S. 103, 34 S. Ct. 717, 58 L. Ed. 1237.

In *Truax* v. *Corrigan,* 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, the court said:

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the 14th Amendment, we are at full liberty to consider them as was the state Supreme Court. Mackay *v.* Dillon, 4 How. 431, 11 L. Ed. 1038; Dower *v.* Richards, 151 U. S. 658, 667, 38 L. Ed. 305, 308, 14 S. Ct. 452. • • •"

The court said:

> "If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

Continuing in *Truax* v. *Corrigan, supra,* the court said:

> "In view of these decisions, and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state Supreme Court in this regard. • • • A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner

> of the business and the premises of his property without due process, and cannot be held valid under the 14th Amendment."

See also *Fiske* v. *State of Kansas*, 47 S. Ct. 655, 274 U. S. 380, 71 L. Ed. 1108, and *First Nat. Bank of Hartford* v. *City of Hartford*, 47 S. Ct. 462, 273 U. S. 548, 71 L. Ed. 767, reversing 203 N. W. 721, 187 Wis. 290.

Southern Railway Co. v. *Virginia*, 290 U. S. 190.

The decision in the present appeal case cannot rest on the independent ground of *res judicata*.

Southern R. Co. v. *Clift*, 260 U. S. 316, 43 S. Ct. 126, 67 L. Ed. 283, where the court held that a decision of a State court disposing of a Federal question by following its decision on a former appeal as the law of the case cannot be regarded as resting on the independent non-Federal ground of *res judicata*.

This Court has held that courts of inferior, limited, jurisdiction, must be confined to their statutory duty and authority, and jurisdictional facts must appear of record. That is the law in Mississippi, by a long line of decided cases which have never been deviated from, except in the present appeal case, and appellant, taxpayer, is thus denied the equal protection of the law.

Galpin v. *Page*, 85 U. S. (19 Wall.) 21 L. Ed. 959, where the court said:

> "The facts essential to the exercise of a special jurisdiction must appear in such cases upon the record."

The sales tax statute of Mississippi, Sec. 8, Chapter 119, Laws of 1934, as amended by Section 6, Chapter 113, Laws of 1938, confers the only jurisdiction on appellees, Commission, its Chairman, and the Excise Commissioner, to make additional sales tax assessments from "the best information

available" and limits such jurisdiction to cases where it affirmatively appears (a) no returns are made by taxpayers, and (b) where adequate records are not maintained and invoices preserved for a period of two years. Appellant, taxpayer, insisted and claimed he kept adequate records and preserved his invoices for a period of two years. He thus denied jurisdiction of the Commissioner to make additional assessments from the "best information available", or any information. In an unbroken line of decisions, without exception to the decision in the first *Viator* case, the State court held the taxing power was strictly construed, and there was no implied power. In the first *Viator* case the court held the Commissioner had such power as was given him by statute and by necessary implication. The decision is erroneous; it denied appellant, taxpayer, the equal protection of the law.

See *Truax* v. *Corrigan, supra.*

State cases holding the taxing power must be strictly construed are the following:

Miller v. *Illinois Cent. R. Co.*, 146 Miss. 422;
State v. *Union Tank Car Co.*, 151 Miss. 797;
Pan American Petroleum Corp. v. *Miller*, 154 Miss. 565;
McKenzie v. *Adams—Banks Lumber Co.*, 157 Miss. 482;
L. H. Canara Furn. Co. v. *Miss. State Tax Commission*, 160 Miss. 185;
Gully v. *Jackson International Co.*, 165 Miss. 103;
Town of Utica v. *State ex rel. Rice*, 166 Miss. 565.

State cases holding "The affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in other cases;" and "The judgments of courts of limited and special jurisdiction, exercisable in a particular manner, are not in and of themselves, evidence of jurisdiction, and its lawful exercise.

In cases of this character the jurisdictional facts must be shown on the face of the record;" are the following:

Topper Bros. v. *Buttross*, 178 Miss. 659;

Whall v. *Saenger Theatres Corporation*, 200 So. (Miss.) 442;

Root v. *McFerring*, 37 Miss. 17, 17 Am. Dec. 49;

Broom v. *Board of Supervisors of Jefferson Davis County*, 171 Miss. 586;

Stamps v. *Newton*, 3 How. (4 Miss.) 34;

Green v. *Creighton*, 10 Sm. & M. (18 Miss.) 159, 48 Am. Dec. 742;

Dulion v. *Folkes*, 153 Miss. 91;

Jackson Equipment & Service Co. v. *Dunlop*, 172 Miss. 742;

Welch v. *Bryant*, 157 Miss. 559;

Rhodes v. *New Orleans Great Northern R. Co.*, 91 So. (Miss.) 282;

Bolivar County v. *Coleman, et al.*, 15 So. (Miss.) 108, 109;

Lester v. *Miller, Sheriff, et al.*, 24 So. (Miss.) 194;

Garner v. *Webster County*, 31 So. (Miss.) 211;

Adams, State Revenue Agent, v. *First Nat. Bank of Greenwood*, 60 So. (Miss.) 772.

In *Garner* v. *Webster County, supra*, Justice Terral said the order of the board was "stillborn, and had no life from the beginning."

Justice Reed, in *Adams, State Revenue Agent*, v. *First Nat. Bank of Greenwood, supra*, said: "* * * a judgment, void for want of jurisdiction over the subject-matter, may be enjoined in equity."

Wallace v. *State ex rel. Tucker*, 61 So. (Miss.) 163;

Hinton v. *Perry County*, 79 Miss. 618;

Henry et al. v. *Board of Supervisors of Sunflower County*, 71 So. (Miss.) 742, 743;
Craft v. *DeSoto County*, 79 Miss. 546, 31 So. 204.

In *Henderson Molpus Co.* v. *Gammill*, 115 So., at pages 719, 720, the court, through Justice Cook, said:

"It is established by a long line of decisions of this court, that, where a court exercises a special, limited, statutory jurisdiction, nothing is presumed in aid of its jurisdiction, but the record of the proceedings must affirmatively show the existence of every jurisdictional fact necessary to authorize it to act; otherwise its proceedings and judgments are void. Board of Supervisors *v.* Ottley, 146 Miss. 696, 107 So. 753; Smythe *v.* Whitehead, 133 Miss. 184, 97 So. 529; Monroe County *v.* Minga, 127 Miss. 702, 90 So. 443; Robertson *v.* Bank, 115 Miss. 840, 76 So. 689; Henry *v.* Board of Supervisors, 111 Miss. 434, 71 So. 742; Robb *v.* Telegraph Co., 104 Miss. 165, 61 So. 170, 977; Adams *v.* Bank, 103 Miss. 744, 60 So. 770; Hinton *v.* Perry County, 84 Miss. 536, 36 So. 565; Bolivar County *v.* Coleman, 71 Miss. 836, 15 So. 107; Marks *v.* McElroy, 67 Miss. 545, 7 7 So. 408."

Lee et al. v. *Bassett, et al.*, 121 So. (Miss.) 843;
Boutwell v. *Board of Supervisors*, 128 Miss. 337, 91 So. 12;
King et al., v. *Board of Supervisors*, 133 Miss. 501, 97 So. 811.

The Bill of Complaint filed in this appeal case denies the jurisdiction of appellees, Commission, its Chairman, and the Excise Commissioner. The demurrer admits the fact. Without jurisdiction appellant, taxpayer, was denied Due Process of Law.

Appellant, taxpayer, was denied the equal protection of the law. The case against him is the first time in the history of the State that the court decided contrary to the cases

cited above, and many others too numerous to mention here.

The decision of this Court in the former appeal case, 62 S. Ct. 1109, and 62 S. Ct. 1275, has no effect on this appeal. The former appeal case was an appeal from an adverse decision in certiorari proceeding. The State court held the facts were not before the court, and the merits of the case were not decided and adjudicated. The decision in the first appeal case reported in 193 Miss. 266, 5 So. (2d) 487, held one thing and only one thing, as shown by the opinion of the court, copy of which is attached to appellant's jurisdictional statement filed herein. The decision of the state court in the present appeal case is erroneously based on the doctrine of the Law of the case and res judicata. Copy of the opinion of the State court in this present appeal case is also attached to appellant's jurisdictional statement.

The counter jurisdictional statement of appellees, filed herein, fails to conform to and comply with Rule 12, Paragraph 3 of the Court. The motion to dismiss or affirm does not state clearly its object and the facts on which it is based. The counter jurisdictional statement shows that the position of appellants is correct. Appellees admit that additional sales tax assessments can only be made where adequate records are not kept and invoices preserved for a period of two years, citing Section 8, Chapter 119, Laws of 1934, as amended by Section 6, Chapter 113, Laws of 1938. Appellees do not quote evidence from the record, or refer to the record, showing such failure of taxpayer. Copies of the order of appellees, Exhibited with the Bill of Complaint are silent as to jurisdictional facts. The Bill of Complaint charges and the demurrer admits that taxpayer kept adequate records and preserved invoices for two years. Jurisdiction of appellees is thus questioned and put in issue. Without jurisdiction all proceedings against taxpayer are void, and deny him due process of law.

Appellants having attacked the jurisdiction of appellees, Commission, its Chairman and the Excise Commissioner, and denied failure of taxpayer to maintain adequate records and preserve invoices, appellees, were, and are, duty bound to affirmatively prove jurisdiction.

Ng Fung Ho v. *White,* 259 U. S. 276;
Galpin v. *Page,* 85 U. S. (19 Wall.) 21 L. Ed. 959;

Appellant, taxpayer, alleges, and the demurrer admits, that he cannot pay the tax assessed against him; he does not have the money.

Matthews v. Rodgers, 284 U. S. 521, 52 S. Ct. 217, 76 L. Ed. 447;
Great Lakes Dredge & Dock Co. v. *Huffman,* 63 S. Ct. 1073;

Section 8, Chapter 113, Laws of 1938 of the General Laws of Mississippi, does not allow recovery of interest on any taxes paid under protest or otherwise. No rate is fixed by the statute. The Mississippi Supreme Court holds that no interest can be recovered.

In *Gulf M. & O. R. Co.* v. *Webster County,* 13 So. (2d) 644-5, the Court, through Chief Justice Smith, said:

> "No interest on the taxes paid by the appellant can be allowed as we have no statute so providing. Moore *v.* Tunica County, 143 Miss. 839, 108 So. 900, City of Indianola *v.* Gates, 181 Miss. 145, 179, So. 284."

In *Moore* v. *Tunica County,* 143 Miss. 839, 108 So. 900, the Court, through Chief Justice Smith, said:

> "The judgment entered by the clerk of this court does not include any interest on the amount recovered, and the appellant has filed a motion to correct that judgment by adding thereto interest on the amount recovered from the date of the refusal of the board of supervisors of the county to pay it. * * * The ques-

tion for decision is: Whether a county, in the absence of a lawful contract therefor, is liable for interest on claims against it. * * * The appellant has not pointed out the statute under which he claims to be entitled to interest against the county, but we presume it is the general statute, section 2678, Code of 1906 (Hemingway's Code, Sec. 2075), which provides that: 'The legal rate of interest on all notes, accounts and contracts shall be six per cent. per annum.' As neither the state nor its political subdivisions are specifically mentioned in this statute, it does not apply to them under the decisions herein last referred to, and which were followed in the cases of Pearl River County *v.* Blodgett, 102 So. 5, and Yazoo City *v.* Taylor, 104 So. 111, recently decided in this court, but in which no written opinions were delivered. The motion will be overruled."

The legislature of Mississippi has never appropriated money to pay interest on taxes erroneously paid or illegally collected. The Mississippi Code of 1930, Section 3276, provides that no such payments can be made without an appropriation. The appropriations statutes (copied in Bill of Complaint, R. 35, 6, 7, 8, 9, 40.) require compliance with Section 3276, Code of 1930.

Section 6, Chapter 113, Laws of 1938, and Section 8, Chapter 113, Laws of 1938, afford taxpayer an election of remedies. They may contest their liability for additional sales tax assessments made against them by the commissioner, incur the risk of damages and penalties, or pay the tax and sue for its recovery. Taxpayer here elected to contest. If he had paid the tax he could not recover interest; if the Attorney General failed or refused to give his opinion, the auditor of public accounts failed or refused to audit the claim, and the Chairman of the State Tax Commission failed or refused to certify as to overpayment (code 1930, Section 3276), taxpayer would be compelled to resort to

mandamus. He could never mandamus the Legislature of the State to appropriate money for the payment of interest. No interest has ever been appropriated, as shown by the appropriations statutes.

Counsel for appellees incorrectly states the effect of the decision of the State court in *Kerr* v. *Stone*, cited in his counter jurisdictional statement. Said case is not authority for what appellees contend, and we here quote from the opinion of the court as follows:

> "The record disclosed that the Commission proposed the additional assessment against the taxpayer, whereupon the latter filed his petition 'for a hearing and a correction * * * of the tax so assessed' pursuant to the provisions of Section 10 of Chapter 119, Laws of 1934. * * * The Commission was acting with full authority in the matter. It was peculiarly within its jurisdiction and the procedure followed was that prescribed by the statute. No question is raised as to the adequacy of the hearing upon the taxpayer's petition. It is true that if the Commission were acting in a matter beyond its jurisdiction (Browning *v.* Matthews, 73 Miss. 343, 18 So. 658; Hinton *v.* Board of Supervisors of Perry County, 84 Miss. 536, 36 So. 565), or in an unauthorized manner (Morgan *v.* Wood, 140 Miss. 137, 106 So. 435), or if the proceedings for the imposition and assessment of the tax were void (City of Meridian *v.* Ragsdale, 67 Miss. 86, 6 So. 619; Ball *v.* City of Meridian, 67 Miss. 91, 6 So. 645), it would have acted 'without authority of law' * * *."

Appellees rest their motion to dismiss or affirm this appeal on two propositions. First, that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Second, that the decision of the State court in the first appeal (*Viator* v. *State Tax Commission*, 193 Miss. 266, 5 So. (2d) 487) is the law of the case and res judicata. As shown in Assignment of Error

Nos. 30-34 the Supreme Court has purposely sought to avoid the jurisdiction of this court. Appellees do not deny the allegations of the Bill of Complaint that the statutes of the state as construed and applied are in conflict with the constitution of the United States, and that the validity of said statutes is drawn in question. They do not deny the federal question was timely raised in the lower court and in the Supreme Court of Mississippi, and that the decision of the State court could not have been reached without deciding it. The decision of the State court is put upon a basis of fact shown to be without support in the record. In the first appeal case the State court held it could not consider the complaint of lack of evidence to sustain the administrative order, and, perforce, in effect, held taxpayer had misconceived his remedy. While the state court affirmed the assessment in the certiorari proceeding in the first case, its judgment must be interpreted in the light of the court's opinion, findings, and conclusions of law, as was said by Mr. Chief Justice Stone, in *Great Lakes Dredge and Dock Co.* v. *Huffman*, 63 S. Ct. 1071.

In *Durosseau* v. *U. S.*, 6 Cranch 307, 3 L. Ed. 232, the court held that a decision is not an authority upon a question not considered by the court, though involved in a case decided.

In the recent case of *Tait* v. *Western Md. Railway Co.*, 289 U. S. 620, Mr. Justice Roberts, at page 623, said:

> "The scope of the estoppel of a judgment depends upon whether the cause arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the later the inquiry is whether the point or question to be determined in the later case is the same as that litigated and determined in the original action. Cromwell *v.* County of Sac., 94 U. S. 351, 352, 353; Southern Pacific R. Co. *v.* U. S.,

168 U. S. 1, 48; United States *v.* Moser, 266 U. S. 236, 241."

If appellant, taxpayer, has no adequate remedy in the state court, as he contends, the constitutional issue raised in this appeal case must be decided by this Court. In *Matthews* v. *Rodgers*, 284 U. S. 521, 52 S. Ct. 217, 76 L. Ed. 447, this court recognized and held that the Federal Courts in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. However, in *Matthews* v. *Rodgers, supra,* the court went on to say that in the absence of allegations in the Bill of Complaint, which were wanting there, of inability of the taxpayer to pay the tax, or of the tax collector to respond to judgment, the Federal Courts would not enjoin the fiscal operations of the State, provided the Federal right asserted may be preserved without it. The question then for decision on the Motion to Dismiss or Affirm, is whether appellant, taxpayer has an adequate remedy in the State court, as charged by appellees. They plant themselves on that proposition, aside from saying the decision in the first appeal case is the law of this case and res judicata, which it is not and cannot be for the reasons shown above. The State court holds that no interest can be recovered in the absence of a statute so providing. *G. M. & O. R. Co.* v. *Webster County, supra,* and *Moore* v. *Tunica County, supra.* The appropriations statutes copied in the Bill of Complaint filed herein, at R. 35, 6, 7, 8, show that no appropriation has been made by the Legislature of Mississippi for the payment of interest and for the payment of taxes unlawfully collected, but only erroneously paid, and that such payments, as can be made, may only be made pursuant to the

provisions of Section 3276 of the Mississippi Code of 1930, copied in appellant's Bill of Complaint, and provided that an appropriation has first been made to pay such refund or refunds. By the express provisions of Section 3276, Code of 1930, which is made a part of each of said appropriation statute, claimant for such refund must make application, and the auditor of public accounts must make careful investigation of such claims and audit such claims against each separate fund in proportion to the amount paid over to such fund in each case, and submit such audited claim with the voucher and evidence on which such claim is based, to the Attorney General for his inspection and approval, and if the Attorney General be of the opinion that such claim should be paid he shall approve the same, and the auditor shall thereupon file such voucher and other papers necessary in each case in his office as a voucher and issue his warrant on the State Treasurer, and in cases of sales tax refunds of taxes erroneously paid, but not unlawfully collected, the chairman of the state tax commission must also certify to such over payment, before any monies can be refunded and paid to taxpayers. Should the Attorney General not be of the opinion that the tax should be refunded, the auditor of public accounts not audit the claim and the chairman of the State Tax Commission not certify to its correctness, the taxpayer would be compelled to resort to mandamus in each instance, and against each of the named officers. Instead of having an adequate remedy at law in the State Court, taxpayer would be compelled to resort to a multiplicity of suits without any assurance of success. Appellees do not, and cannot, point to a single authority of the state Supreme Court sustaining their position that taxpayer has an adequate remedy in the courts of his state.

The Bill of Complaint in this appeal case alleges and the demurrer admits that appellant taxpayer is unable to pay

the tax; he does not have the money. Until such time as he could pay every penny of the sum demanded, he would be without right to maintain an action to recover said tax. In the meantime, his property would be sacrificed and sold and he would be out of business. This is what the Bill of Complaint alleges and the demurrer admits (R. 57, 140).

Opposed to the contention of appellees that Section 10 of Chapter 119, Laws of 1934, amended by Section 8 of Chapter 113, Laws of 1938, provides an adequate remedy to principal appellant and taxpayer, is the appropriation statute of Mississippi copied in the Bill of Complaint and Section 3276 of the Mississippi Code of 1930, as well as the cases of *G. M. & O. R. Co.* v. *Webster County, supra,* and *Moore* v. *Tunica County, supra,* and the fact that the Bill of Complaint alleges and the demurrer admits that taxpayer is unable to pay the tax, because, he says, he does not have the money. Again, in opposition to the Motion to Dismiss or Affirm, and the contention of appellees that Section 10, Chapter 119, Laws of 1934, amended by Section 8, Chapter 113, Laws of 1938, requires the payment of the amount of additional sales tax assessments and suit for their recovery in the Circuit Court of the County of taxpayer's residence, is Section 6, Chapter 113, Laws of 1938, which provides that taxpayer may petition the Commissioner, for a hearing within ten days from receipt of registered notice and demand a hearing, which Section (6) requires the Commissioner to investigate the matter fully before proceeding further. Section 10 as amended by Section 8, Chapter 113, Laws of 1938, covers a different situation, and provides that taxpayer may petition for a hearing before the entire commission and show the amount by which the tax should be reduced. It does not cover a situation where the entire assessment is erroneous and the amount is not owed by taxpayer. It does not attempt to embrace a case where

additional sales tax assessments are made from the best information available by the chairman of the commission for failure of taxpayer to maintain adequate records and preserve invoices for two years. Section 6 deals solely with this appeal case, and the remedy there provided must be applied. The legislative mind having been directed to one subject matter, and that being additional assessments from the best information available, for failure of a taxpayer to maintain adequate records and preserve invoices, that Section must govern over others, not because one Section of a Legislative enactment has more force than others, but because the Legislative mind having been directed to the single subject-matter dealt with in the one must be presumed to govern over others. The Legislature of Mississippi provided an election of remedies to taxpayers against additional sales tax assessments. They may, on the one hand, contest their tax liability with the taxing officials, incur the risk of penalties of twenty-five per cent for the first offense, and fifty per cent for a second offense and interest at the rate of one per cent per month from date said tax is determined to be due and on the other hand, they might elect to pay the tax in the first instance and sue to recover it, incurring the risk only of being cast for costs if unsuccessful.

Questions involved in this appeal case are substantial. They are: Do the state statutes, cited here and quoted in appellants' jurisdictional statement, as construed and applied against appellants, by appellees, Commission, its Chairman and the Excise Commissioner, violate the 14th Amendment to the Constitution of the United States and deny appellants due process of law and equal protection of the law and violate Section Fourteen of the Constitution of Mississippi. It is respectfully submitted that this Honorable Court has jurisdiction in this appeal case under Sec-

tion 237 (a) of the Judicial Code as amended, and the obligatory appellate jurisdiction of this court is invoked to review the decision of the Supreme Court of the State of Mississippi.

Appellants, therefore, respectfully submit that the motion to dismiss or affirm should be overruled, and jurisdiction noted in this appeal case.

Appellants respectfully call the court's attention to the order of Mr. Justice Hugo L. Black, dated October 6, 1943, filed with the Clerk of this court, granting an extention of time within which appellants may apply for Writ of Certiorari and show the court that petition for Writ of Certiorari and accompanying brief will shortly be filed in this court with a certified copy of the transcript of the record as required by the Rules of this Court, in which petition and brief appellants will cover the matter fully, as they will do in their brief on the merits to be filed in this appeal case.

It is, therefore, respectfully submitted that the Motion to Dismiss or Affirm should be overruled.

Respectfully submitted,

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Counsel for Appellants.

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